

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION : MDL No. 2804
OPIATE LITIGATION :
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Case No. 1:17-CV-2804
:
Cleveland, Ohio
:
:
APPLIES TO ALL CASES : Tuesday, January 9, 2018
:
9:12 a.m.
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAN A. POLSTER
UNITED STATES DISTRICT JUDGE

AND

BEFORE THE HONORABLE DAVID A. RUIZ
UNITED STATES MAGISTRATE JUDGE

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24 Proceedings recorded by mechanical stenography, transcript
25 produced by computer-aided transcription.

1 MORNING SESSION, TUESDAY, JANUARY 9, 2018

2 (Proceedings commenced at 9:11 a.m.)

3 - - -

4 THE COURT: Everyone can be seated. Except I
09:11:40 5 apologize. We brought in extra chairs, but I guess they ran
6 out of extra chairs.

7 All right. Well, good morning, Everyone.

8 This is the first meeting of counsel in the opioid
9 MDL. Judge Ruiz and I are here, and, again, I apologize.
09:12:12 10 The courtroom isn't big enough. I've reserved the 16th
11 floor, those two courtrooms, for some private conferences
12 with counsel that we will probably go into.

13 I appreciate all of the submissions that I've
14 received. Some have been exchanged. Some were *ex parte*, as
09:12:38 15 I permitted. I've given a lot of thought to what to do.
16 All of the submissions focused on how a judge should manage
17 this MDL and the 200 or more cases in sort of a traditional
18 manner. I appreciate that.

19 I've handled and managed two other MDLs, and I'm
09:13:13 20 familiar with many of the others that my colleagues have
21 handled around the country. But this is not a traditional
22 MDL. It generally focuses on something unfortunate that's
23 happened in the past, and figuring out how it happened, why
24 it happened, who might be responsible, and what to do about
09:13:40 25 it.

1 What's happening in our country with the opioid crisis
2 is present and ongoing. I did a little math. Since we're
3 losing more than 50,000 of our citizens every year, about
4 150 Americans are going to die today, just today, while
09:14:08 5 we're meeting.

6 And in my humble opinion, everyone shares some of the
7 responsibility, and no one has done enough to abate it.
8 That includes the manufacturers, the distributors, the
9 pharmacies, the doctors, the federal government and state
09:14:33 10 government, local governments, hospitals, third-party
11 payors, and individuals. Just about everyone we've got on
12 both sides of the equation in this case.

13 The federal court is probably the least likely branch
14 of government to try and tackle this, but candidly, the
09:14:58 15 other branches of government, federal and state, have
16 punted. So it's here.

17 So I don't think anyone in the country is interested
18 in a whole lot of finger-pointing at this point, and I'm not
19 either. People aren't interested in depositions, and
09:15:21 20 discovery, and trials. People aren't interested in figuring
21 out the answer to interesting legal questions like
22 preemption and learned intermediary, or unravelling
23 complicated conspiracy theories.

24 So my objective is to do something meaningful to abate
09:15:51 25 this crisis and to do it in 2018. And we have here -- we've

1 got all the lawyers. I can get the parties, and I can
2 involve the states. So we'll have everyone who is in a
3 position to do it. And with all of these smart people here
4 and their clients, I'm confident we can do something to
09:16:17 5 dramatically reduce the number of opioids that are being
6 disseminated, manufactured, and distributed. Just
7 dramatically reduce the quantity, and make sure that the
8 pills that are manufactured and distributed go to the right
9 people and no one else, and that there be an effective
09:16:40 10 system in place to monitor the delivery and distribution,
11 and if there's a problem, to immediately address it and to
12 make sure that those pills are prescribed only when there's
13 an appropriate diagnosis, and that we get some amount of
14 money to the government agencies for treatment. Because
09:17:10 15 sadly, every day more and more people are being addicted,
16 and they need treatment.

17 So that's what I am interested in doing. I mean, I'm
18 really -- you know, if I've got to do it in a traditional
19 way, and -- I guess I'll have no choice. I'll admit failure
09:17:32 20 and I'll say, All right. We've just got to plow through
21 this, and, you know, if we can't accomplish something like
22 what I've talked about then, you know, I'll talk to
23 everyone. But my present intention is to turn everyone
24 loose. I'll turn the plaintiffs loose on the defendants;
09:17:56 25 I'll turn the defendants lose on the plaintiffs. You'll,

1 you know, tear each other up way down in 2017 [sic] for
2 discovery. You can go after the federal government, full
3 discovery there, too. You know, FDA, DEA, have at it, and
4 in 2019, I'll try the Ohio case myself and see what happens,
09:18:21 5 after dealing with whatever motions, and I'm sure some of
6 the claims and theories are going to be knocked out and some
7 will survive. And I'll try the case that I have
8 jurisdiction over, which is the Northern District of Ohio
9 group. What that will accomplish, I don't know. But I'd
09:18:42 10 rather not do that.

11 So that's really what I want to talk to everyone
12 today, and if we can get some agreement on both sides that
13 that's what we ought to do and that's how we should spend --
14 I mean, look around this room; an incredible amount of
09:18:59 15 talent. I doubt if any judge has ever assembled this kind
16 of talent ever. And I'm talking about you, certainly not --
17 and Judge Ruiz, not me. Okay?

18 But that's what -- I think we have an opportunity to
19 do it, and it would be an abject abdication of our
09:19:19 20 responsibility not to try it. And if we can't, then we've
21 got to do the other way. And if we can get some general
22 agreement that we should try it, then we'll figure out
23 today, how do we organize that effort, who is not here that
24 we need to get involved, and we'll get about doing it and
09:19:46 25 what help I'll need.

1 As I indicated in my prior order, I haven't made a
2 final decision on what to do regarding Special Master or
3 Special Masters. I looked carefully at the recommendations,
4 suggestions of the parties. I had some preliminary
09:20:10 5 discussions with three people suggested, who I happen to
6 know because I've worked with them: David Cohen,
7 Cathy Yanni, and Francis McGovern.

8 I asked David Cohen and Francis McGovern to listen in
9 by telephone today, and then I'll decide, after we have
09:20:35 10 probably some private discussions, what I'll do in that
11 regard.

12 So I know none of you were expecting what I just said,
13 but I certainly want to hear from you. I mean, I knew what
14 I was going to say. I have no idea what any of you are
09:20:56 15 going to say.

16 And so the one thing I would request, because,
17 obviously, we have a court reporter, is that anyone who
18 speaks, I think it will actually be better if you stay
19 seated by a microphone.

09:21:10 20 Is that right, Katie?

21 Or the podium, all right? If you're not seated -- if
22 you're seated at a table by a microphone, the sound will
23 work better if you stay seated. I know it's sort of
24 counterintuitive, you always stand in the court, but it
09:21:29 25 works better if you're seated. If you're not seated by a

1 microphone, then if you can use the lectern, because there's
2 a microphone there, and then just please identify yourself
3 and who you're representing.

4 I hope someone speaks. I don't -- I'd hate to listen
09:22:00 5 to myself again.

6 MR. RICE: Good morning, Your Honor.

7 Joe Rice with Motley Rice here on behalf of the
8 plaintiffs. Thank you for your comments.

9 I think I can say on behalf of all the plaintiffs that
09:22:13 10 we share your feeling of urgency. And I can tell you that
11 all of our clients are dealing with this every day at the
12 city, county level, everybody.

13 So we are here to give you the time and the talents
14 that we can have to try to bring something together as
09:22:29 15 quickly as possible.

16 THE COURT: Thank you, Joe.

17 MR. HANLY: Your Honor, if I may.

18 Yes, Judge. My name is Paul Hanly. I'm co-lead with
19 Mr. Rice and Mr. Farrell.

09:22:42 20 If I might just address the Court's comment about the
21 submissions. The plaintiffs' submission does discuss
22 litigation options. And I want to explain to the Court that
23 that's based upon good-faith discussions that we all had
24 with certain of the defendant representatives.

09:23:01 25 So we did not feel it was sufficient simply to agree

1 with the Court concerning the resolution track -- which we
2 are very, very much in favor of -- but we felt it important
3 also to present, from the plaintiffs' point of view,
4 possible litigation strategies, given that certain of the
09:23:20 5 defendants were talking in terms of litigation before they
6 wanted to discuss resolution.

7 THE COURT: All right. I understood that,
8 Paul.

9 But the resolution I'm talking about is really -- what
09:23:37 10 I'm interested in doing is not just moving money around,
11 because this is an ongoing crisis. What we've got to do is
12 dramatically reduce the number of the pills that are out
13 there and make sure that the pills that are out there are
14 being used properly. Because we all know that a whole lot
09:24:02 15 of them have gone walking and with devastating results. And
16 that's happening right now.

17 So that's what I want to accomplish. And then we'll
18 deal with the money. We can deal with the money also and
19 the treatment. I mean, that's what -- you know, we need a
09:24:26 20 whole lot -- some new systems in place, and we need some
21 treatment. Okay? We don't need -- we don't need a lot of
22 briefs and we don't need trials. They're not going
23 to -- none of them are -- none of those are going to solve
24 what we've got.

09:24:41 25 So, again, you know, ideally, this should be handled

1 by the legislative and executive branches, our federal
2 government, and our state governments. They haven't seemed
3 to have done a whole lot. So it's here. So . . .

4 MR. CHEFFO: Good morning, Your Honor. This
09:25:14 5 is Mark Cheffo for --

6 THE COURT: Yes, Mark.

7 MR. CHEFFO: One of the liaison counsel for
8 the manufacturers. I would, I think, just echo really what
9 Your Honor said and what counsel said.

09:25:24 10 I think from our perspective, we certainly welcome the
11 opportunity to talk in more detail with the Court. It
12 sounds like that's what you have in mind. I think all of us
13 recognize that there is issues in this country. I think we
14 all, to the extent that we can, want to be part of the
09:25:39 15 solution and work with Your Honor in trying to hear about
16 some of the ways that we might move forward.

17 I think that Your Honor kind of articulated at a high
18 level some of the impediments that might be in our way to
19 try and get from here to where Your Honor's vision is. So I
09:25:57 20 think we'd be interested in exploring that a little more.
21 You know, as you said, some of the issues include kind of
22 working through expectations, and also, you know, frankly,
23 making sure that the right folks are at the table, and many
24 of them are maybe not in this room as well.

09:26:12 25 So I think that, you know, we welcome the opportunity

1 to kind of sit down with the Court, hear your ideas, and try
2 to be as productive as we can. And, you know, I'm sure, as
3 you know, there's a lot of defendants in this room, too, and
4 they'll all have their own specific issues and concerns.

09:26:29 5 But I think I'm very comfortable telling the Court that we
6 want to participate with Your Honor and at least try and
7 explore some of these ideas.

8 THE COURT: Okay. Thank you, Mark.

9 MS. MAINIGI: Your Honor, Enu Mainigi from
09:26:44 10 Williams & Connolly on behalf of Cardinal Health. And I'm
11 also liaison counsel for the distributors.

12 We echo Mr. Cheffo's comments. We recognize that
13 there's a problem out there. We're happy to have
14 discussions with Your Honor. And we're pleased that
09:27:00 15 Your Honor has referenced the fact that there are state and
16 federal governments that are also involved here that may
17 need to be involved in the process.

18 I think as we've been having good-faith discussions
19 with plaintiffs' counsel in anticipation of today, and,
09:27:19 20 indeed, after the MDL was filed, I think that it's certainly
21 become clear to us that, as Your Honor has seen from various
22 papers that have been filed, that there are, in fact, the
23 impediments that Mr. Cheffo pointed out, certain threshold
24 issues that -- and they're not necessarily the same for
09:27:43 25 distributors, manufacturers, and other defendants, but there

1 are certain threshold issues that we think the resolution of
2 those, in some manner, and we're happy to work with the
3 Court and with plaintiffs' counsel to figure out how best to
4 get those issues decided.

09:28:00 5 But we actually think that the resolution of some of
6 those issues would be extremely helpful in then moving
7 forward with discussions about what can be done in a variety
8 of ways about this problem.

9 But we welcome the opportunity to speak to Your Honor,
09:28:20 10 either here in this group setting, or I think you alluded to
11 separate meetings at some point, but we're happy to
12 elaborate on that.

13 THE COURT: All right. Well, I appreciate
14 those comments.

09:28:41 15 As I presently thought through this, I'm not inclined
16 to tackle legal issues without a full factual record, and I
17 know what it will take to get a full factual record, how
18 much time and how much money. And if I've got to do that,
19 we'll do that. But I'm really not interested in deciding
09:29:09 20 legal issues in a vacuum just on motions. I want to know
21 what the facts are, because the facts often drive the law.

22 So if we have to go down that route, my present
23 inclination is to just let each of you have at it, and go at
24 each other, all -- I don't know how many we've got -- 150,
09:29:37 25 200 of you, plus legions who aren't here, and, you know, the

1 plaintiffs will turn the manufacturers, distributors, and a
2 few doctors, upside down, inside out. The defendants will
3 turn federal government, state government, counties, cities,
4 inside out, upside down over 2018, and then I'll probably
09:30:03 5 try the Ohio ones in 2019 after I decide the motion.

6 I really don't want to do that. It isn't going to
7 resolve anything. But my -- maybe you can convince me
8 otherwise, but I've given a lot of thought, and my present
9 feeling is I'm not going to decide these very interesting
09:30:21 10 and important legal issues in a vacuum without having a full
11 record. So if we've got to go down that way, you know, we
12 all know how to do that. I know how to do it and you all
13 know how to do it.

14 But while we do that, another 50- or 60,000 people are
09:30:43 15 going to die, and we'll be absolutely no closer to abating
16 that.

17 I mean, I read recently that we've managed in the last
18 two years, because of the opioid problem, to do what our
19 country has not done in 50 years, which is to -- for two
09:31:04 20 consecutive years, reduce, lower the average life expectancy
21 of Americans. And if we don't do something in 2018, we'll
22 have accomplished it for three years in a row, which we
23 haven't done since the flu epidemic 100 years ago wiped out
24 10 percent of our population. And this is 100 percent
09:31:27 25 manmade. Now, I'm pretty ashamed that this has occurred

1 while I've been around. So I think we all should be.

2 All right. Does anyone want to say anything more
3 before we maybe have some separate caucuses? And my plan is
4 to -- I'm going to use the 16th floor. I've got two
09:31:52 5 courtrooms, and I think I'm going to put the plaintiffs'
6 leadership team in one room and the defendants' leadership
7 team in the other room. And I guess -- I don't know how
8 much -- you know, if there's room for others, that's okay,
9 too. But I want to have some candid discussions.

09:32:19 10 MR. CHEFFO: Your Honor.

11 THE COURT: Yes.

12 MR. CHEFFO: If I might, just one thing.

13 I think that's on. Sorry about that.

14 I think, again, in the spirit of trying to work with
09:32:23 15 the Court on identifying -- so I think what we all need to
16 do -- and I think Your Honor, I'm sure, appreciates this --
17 is to just try and identify what we all may think are
18 impediments to get to where Your Honor wants. One of the
19 issues is that -- probably unfortunately from our
09:32:38 20 perspective where we sit, the only -- this is not the only
21 place where activity is occurring, so --

22 THE COURT: Yeah, well, I can -- I can -- the
23 advantage of a federal judge is, I can order anyone in that
24 I want. I, obviously, can pick up the phone and talk to
09:32:53 25 anyone I want. I can pick up the phone and call any state

1 attorney general I want and invite him or them to be
2 involved, and I'm sure they will. They've got the same
3 interests.

4 I do not control the DEA or the FDA. I can
09:33:14 5 certainly -- if their involvement is necessary, I can invite
6 it. I can invite it.

7 MR. CHEFFO: Yeah, and that's -- that would
8 be -- I think, as we move forward, that would be extremely
9 helpful. There's also the situation that many of the
09:33:28 10 extremely, as you said, talented lawyers on the plaintiffs'
11 side here also do have some state court cases.

12 THE COURT: I understand that.

13 MR. CHEFFO: So to the extent that we're doing
14 a stand down here, if it -- you know, if things kind of
09:33:38 15 progress in other places, that that might interfere with the
16 Court's ability to kind of get us to focus on these issues.

17 So I just throw that out as one of the issues the
18 Court might want to consider.

19 THE COURT: I can understand that. I can't --
09:33:52 20 I can make requests. There's some things a federal judge
21 can order, but I can't order a state judge to do anything,
22 and -- I can make requests, and I think most -- I mean,
23 everyone should want to work together to abate the crisis
24 first and then figure out what to do. But, again, I can
09:34:12 25 make requests.

1 MR. RICE: Your Honor.

2 THE COURT: Yes.

3 MR. RICE: Joe Rice.

4 THE COURT: Yes, Mr. Rice.

09:34:23 5 MR. RICE: There's one item of information
6 that's available, but not available, is where the pills
7 went, where they were sold and sort of the market share
8 situation is in a database that the DEA has. That there is
9 a federal requirement that every time one of these pills is
09:34:40 10 sold, that it's reported where it was sold to. Having that
11 database would give us a format, both sides, to know the
12 extent of involvement by any particular distributor and
13 where maybe we need to focus more of our efforts on, where
14 the pills went.

09:34:57 15 And that was discovery that was underway in the
16 Southern District of Ohio. There had been a subpoena
17 issued. There had been an objection filed. There had been
18 a motion to compel filed, and the DEA -- or DOJ on behalf of
19 the DEA was to file a brief in support of their objection
09:35:19 20 with Judge Sargus. And that was to be filed shortly after
21 the MDL panel ruled, and that got stayed.

22 But that matter is not a legal matter as far as, you
23 know, the overall party, but it is a piece of information
24 that would be extremely valuable to the Court and to all the
09:35:35 25 parties if we could proceed with the production of that

1 ARCOS database.

2 THE COURT: Well, that's one possibility. If
3 I think that we need that data, I can pick that up, and
4 I'll -- if the Department of Justice has objections, I'll
09:35:56 5 certainly consider them. But that is a possibility.

6 So I -- who provides -- the manufacturers and
7 distributors both provide that input, or just the
8 distributors? Where does the input come from?

9 MR. RICE: It comes just from the
09:36:14 10 distributors.

11 MS. MAINIGI: Your Honor, if I may.

12 THE COURT: Yes.

13 MS. MAINIGI: At least on behalf of the
14 distributors, the ARCOS data is composed, in significant
09:36:29 15 part, of data from distributors. I think that there may be
16 some coming from the manufacturers, but I'll let them speak
17 to that.

18 In terms of what Mr. Rice indicated, I know -- I think
19 we are putting the cart before the horse. I would suggest
09:36:45 20 that to the extent --

21 THE COURT: Well, I'm not -- I just want to
22 know where the -- so obviously each distributor knows its
23 data, but --

24 MS. MAINIGI: Correct.

09:36:55 25 THE COURT: -- you wouldn't know --

1 MS. MAINIGI: We do not have the ability.

2 THE COURT: -- the data that anyone else is
3 inputting. So you've got -- obviously, you know your data,
4 and you know what you're transmitting. Okay. And then the
09:37:03 5 DEA compiles it. So at the moment, they would be the only
6 entity that has everyone's data --

7 MS. MAINIGI: Correct, Your Honor.

8 THE COURT: -- correct?

9 MS. MAINIGI: That's correct.

09:37:13 10 THE COURT: Okay.

11 MS. MAINIGI: And I know just procedurally,
12 the DEA had lodged an objection. I don't know if that's
13 something they intend to renew if this request is renewed.

14 THE COURT: Look, you know, I'm a former
09:37:29 15 prosecutor, and I can imagine that the DEA and the
16 Department of Justice may very well have ongoing
17 investigations as the result of the data. They're not just
18 compiling that data for the heck of it. Everyone knows why
19 the DEA would want to have that data. And the last thing I
09:37:50 20 want to do is mess up an ongoing criminal investigation
21 and/or prosecution. And that's the problem with just
22 willy-nilly making all of that data public.

23 MR. FARRELL: Judge, this is Paul Farrell --

24 THE COURT: Yes.

09:38:05 25 MR. FARRELL: -- from West Virginia, and I was

1 counsel in the City of Cincinnati. The Touhy letter that we
2 issued to the Department of Justice addresses some of those
3 concerns. There's been -- the ARCOS data has been briefed
4 in the Madel case out of the Eighth Circuit that was pending
09:38:20 5 in Minnesota. So it's a pretty well-defined argument on the
6 objections.

7 We believe that limiting the scope of the request to
8 the time frame in which the opioid epidemic arose and
9 eliminating, say, the last 12, 16, 24-months worth of data
09:38:38 10 preserves the ability of the Department of Justice --

11 THE COURT: Well, you know, this is a
12 complicated issue. Judge Sargus probably was considering
13 it. I'm certainly not going to do anything on the fly. I'm
14 not sure if it's necessary to have all that data to do the
09:38:56 15 kind of -- have the kind of discussions we're having.

16 I'd like to -- I think at this point, I'm going to
17 talk privately to each side and see where we go. If we get
18 some traction, then we'll figure out what the next steps
19 are.

09:39:10 20 So let's just say this: We'll have the plaintiffs'
21 leadership in Courtroom 16A and the defendants' leadership,
22 and that's -- I know we've got three tracks or groups of
23 defense counsel. We've got a manufacturers' track, we have
24 a distributor track or group, and we have an individual
09:39:37 25 defendants' track or group, and my order may not have

1 been -- I added a couple of people, and they were being
2 added to the -- what I'll call the individual defendants'
3 steering committee or track. And I think the individual
4 defendants are only doctors.

09:39:55 5 Are there any other individual defendants in the case?
6 I wasn't aware of any.

7 All right. So the individual defendants are -- they
8 are four or five doctors. Okay. So I want all of the
9 defendants' leadership in 16B. And I don't have a problem
09:40:16 10 with other lawyers coming in, but the primary spokespeople,
11 I think, will be the leadership team, which is why they were
12 created, just because it's unwieldy to have so many people,
13 and it's incredibly expensive, and, obviously, we
14 can't -- even if there are 200 people, it's not realistic
09:40:45 15 for 200 people to be addressing the Court and for me to be
16 talking to each of you, so -- but I do appreciate everyone
17 being here for the first meeting.

18 Okay. And for those people on the phone, the
19 conference call will not continue for these private
09:41:09 20 discussions because these are not public proceedings.

21 If we come back together, I don't know if there'll be
22 a capability to get you back on the phone. I don't know --

23 Do we know everyone who is on the phone?

24 All right. So this may be -- probably be the last
09:41:37 25 time -- the last opportunity for those of you on the phone.

1 But I don't know if there are -- I'm not sure there's going
2 to be really a capability to call back in.

3 Although, maybe if and when we come back in, I'll put
4 a quick order out, and you can note -- access the ECF and
09:42:14 5 see when we're going back on the record and call back in.
6 That's about the best I can do. So I'll try to do that.

7 Okay. Then we will adjourn for private caucuses, and
8 I'll see you respectfully down on 16 in a few minutes.

9 Thank you.

09:42:34 10 DEPUTY CLERK: All rise.

11 - - -

12 (Proceedings adjourned at 9:42 a.m.)

13

14

15 **C E R T I F I C A T E**

16

17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled matter.

19

20 /s/ Donnalee Cotone 11th of January, 2018
21 DONNALEE COTONE, RMR, CRR, CRC DATE
Realtime Systems Administrator

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